SUPREME COURT, U. S. 73-611

FILED
OCT 6 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-478

ABRAHAM E. FREEDMAN,

Petitioner,

v.

JAMES M. MORRISSEY, JOSEPH PADILLA, and RALPH IBRAHIM, Individually and on Behalf of the Members of the NATIONAL MARITIME UNION OF AMERICA,

Respondents and Cross-Petitioners,

and

JOSEPH CURRAN, SHANNON WALL, WILLIAM PERRY, MARTIN E. SEGAL and LEON KARCHMER,

Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Cross-Petitioners, James M. Morrissey, Joseph Padilla and Ralph Ibrahim, on behalf of the members of the National Maritime Union of America (NMU) (plaintiffs) respectfully pray that a writ of certiorari issue to review certain portions of a judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on June 18, 1973.

Opinions Below

Prior proceedings are reported at *Morrissey* v. *Curran*, 302 F. Supp. 32 (SDNY, 1969); affirmed, 423 F.2d 393; cert. denied, 399 U.S. 928 (1970), 400 U.S. 862 (1970); on remand, 336 F. Supp. 1107 (SDNY, 1972); 351 F. Supp. 775. The decisions of the District Court dated July 3, 1969 (2), June 29, 1972 (reversed, 423 F. 2d 393, *supra*) and November 15, 1972 are not officially reported. The opinion of the Court of Appeals dated June 18, 1973 is not yet officially reported. All opinions not printed in petitioner's appendix are printed in cross petitioners' supplemental appendix.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered June 18, 1973. A timely petition for rehearing and for rehearing *en banc* by plaintiffs was denied on July 17, 1973 (SA 45).* A petition for rehearing filed by the defendant Perry was granted on August 6, 1973 (SA 46). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Does a panel of a Court of Appeals have the power to overrule another panel of the same court which had made a binding decision on a prior appeal in the same case?

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* References to the petitioner's appendix filed in this Court will be preceded by A.

References to the cross petitioners' supplemental appendix filed in this Court will be preceded by SA.

References to the joint appendix filed in the Court of Appeals will be followed by a.

2. When a pension plan is created by the membership of a labor organization for the exclusive benefit of the elected union officers, may the president of the union successfully appoint persons as officers to enable them to participate in such plan?

3. May a person be appointed to office in an international or national labor union notwithstanding 29 U.S.C. § 481(a)?

4. Should a union officer, who has received notice that an unlawful payment of $222,200.00 is about to be made from union funds and does nothing, be exonerated from liability simply because he did not himself direct such payment?

5. Does a union officer who is on notice that a substantial unlawful payment is about to be made from union funds to his good friend have an affirmative duty to prevent such payment when he has power and opportunity to do so?

6. May a trustee of a union pension fund who has made an unlawful payment of $115,000 in April of 1966 and who is placed on notice in May of 1969 that such payment was unlawful, intentionally stand idly by for three years and let the statute of limitations expire against his trust without incurring a personal liability for his deliberate failure to act?

7. Did the Court of Appeals exceed its authority in making a finding of fact on an issue upon which the District Court did not pass—which finding was not supported by the record and which was contrary to it?

Statutory Provisions Involved

The statutory provisions involved are 29 U.S.C. §§ 501(a) and (b), 431 and 481(a). These provisions are printed in the supplemental appendix (SA 40, 41 and 90).

Statement of the Case and Outline of Previous Proceedings

In May of 1968 the plaintiffs*, who are members of the NMU, in good standing, became aware that certain persons were being included in the NMU Officers' Pension Plan though they were not elected NMU officers. On May 17, 1968, one of the plaintiffs, James M. Morrissey, made demand on the union, its officers and governing body for an accounting and restoration of all damages for losses, liabilities, expenses and expenditures suffered by the National Maritime Union of America by reason of the purported coverage of persons not elected to NMU office (non-officers) in the NMU Officers' Pension Plan (SA 48-49).

When NMU failed to respond, the District Court granted the plaintiffs leave to bring this action. Summary judgment was entered, on the plaintiffs' motion, directing the defendants to account for and refund all money paid to or for the account of non-officers and enjoining any further such payments.

All the defendants appealed and the Court of Appeals for the Second Circuit affirmed the interlocutory judgment which had directed the defendants to account.

The defendants then filed two separate petitions for writs of certiorari, both of which were denied by this Court. [399 U.S. 928 (1970) and 400 U.S. 826 (1970)]

The District Court upon remand after trial of the remaining issues entered judgments in favor of the NMU and

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* To reflect the actual alignment of the parties before this Court and for the sake of clarity, the parties are here referred to as plaintiffs and defendants.

against the NMU Officers' Pension Fund for $674,222.60; against the defendants Perry and Freedman personally for $263,307.00 and $272,740.50 in favor of the NMU Officers' Pension Fund respectively.

Appeals were then taken to the Court of Appeals by all the parties except the defendants Karchmer and Segal. The plaintiffs' appeal raised several issues, including: (1) the limitation of the judgment against the NMU Officers' Fund in favor of NMU to the sum of $674,222.60 although the parties had stipulated that $1,628,921 had been paid to the officers' fund for non-elected persons*; (2) the district court's failure to surcharge the trustees for permitting the statute of limitations to run against their trust in April, 1973 by intentionally failing over a three-year period of time to make any effort to recoup the unlawful payment of $115,000 they had made to Irving Brauch in 1966 after they had been placed on notice in May of 1969 that such payment had, in fact, been unlawfully made; (3)

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* Stipulation of amounts paid to the NMU Officers' Pension Fund for non-elected persons.

	Salaries	*Contribution*	*Interest*
Total 1/8/71	6,388,006	1,689,597	385,972
Adjusted as 7/7/71	113,575	31,729	2,605
	6,274,431	1,657,868	383,367
Agreed	111,337	28,947	2,787
	6,163,094	1,628,921	380,580
Interest Adjusted 6/1/70 to 7/7/71	—	—	57,011
	Total Interest		437,591
	Contributions		1,628,921
			2,066,512
		to 8/23/71	14,661
			2,081,173

the district court's refusal to condemn the immediate payment of $460,365 by Curran and Wall for the very same improper and unauthorized purposes which prompted the Court to mandate the return of the $674,222.60 to NMU in the first instance; and (4) the refusal of the district court to impose liability on Curran and Wall under 29 U.S.C. § 501 for their failure to prevent the unlawful, lump-sum payment of $222,200.00 to Perry, a non-officer, out of the officers' pension fund after receipt of plaintiffs' notice that such unlawful payment was about to be made.

Reasons for Granting the Writ

(1)

The panel of judges on the second appeal undertook to overrule the decision made by the panel of judges on the prior appeal and held that the Officers' Plan was not limited exclusively to elected officers but included some who had been simply designated by Mr. Curran.

This was not only unjustified on the record but was also in direct conflict with the decision made by a different panel on the prior appeal. This conflicting decision "so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." (Rule 19, Revised Rules of the Supreme Court of the United States.)

On the prior appeal, the Court of Appeals affirmed the interlocutory judgment which had directed the defendants to account for all moneys paid out to or for the account of non-officers. *Morrissey* v. *Curran*, 423 F.2d 393 (Lumbard, Chief Judge, Danaher and Anderson, Circuit Judges; opinion by Anderson, C.J., Danaher, C.J., dissenting). That decision limited the governing document to the Plan as approved by the members on February 16, 1953. In describing that instrument Judge Anderson said (423 F.2d 393, 395, SA 3):

> "On February 16, 1953, the trustees adopted a plan whereby pension rights accrued to the various *elected* officials of the Union, including the president, secretary, treasurer, vice-president, national port committee member, branch agent, field patrolman, and patrolman. No non-elected employee of the Union was included under its coverage." (Emphasis added.)

The Court of Appeals held that all subsequent attempts to amend the February 16, 1953 Agreement and Declaration of Trust and Pension Plan were void. *Morrissey* v. *Curran*, 302 F. Supp. 32, aff'd 423 F.2d 393. According to its express terms the trust was established by NMU "for the exclusive benefit of its elected officials" (SA 51) and the plan defined "term of office" as the period of time an officer is "elected to serve" (SA 63).

There was no authority reposed in anyone to add persons who were not elected to office by the membership—regardless of what title may have been conferred upon them. Thus the membership retained the right to say who would benefit by this Plan.

Judge Bonsal recognized this initially when he paraphrased the complaint to equate "non-officers" with persons "who were not elected officers of NMU". *Morrissey* v. *Curran*, 302 F. Supp. 32, 33, SA 25:

> "* * * The complaint alleges that defendants allowed the Pension Plan to be amended in 1961, so as to include as participants designated employees of the NMU, *who were not elected officers of the NMU (non-officers)*, in violation of the NMU Constitution then in effect; and that the amendment was designed to siphon NMU funds to the non-officers who were not authorized to receive them." (Emphasis added. Parenthetical matter in original.)

Obviously the district court intended to define "non-officers" as employees "who were not elected officers".

It had already equated "non-officers" to employees who were not elected officers when it directed "the Trustees to return to the NMU all moneys received by them for the benefit of non-officers" (302 F. Supp. 36).

Judge Anderson, in affirming the district court, had understood what the district court intended when he said that under the Officers' Plan* "pension rights accrued to the various elected officials of the Union" and "No non-elected employee of the Union was included under its coverage" (SA 3).

The decision on the prior appeal thus removed the vice of allowing Curran to appoint those who would participate in the Plan. The Plan was a lucrative one. The membership had adopted it for the "exclusive benefit of its elected officials" (SA51). This was the wish of the membership.

Now, on the second appeal, the same Court by a different panel has held that the Plan was not limited to "elected" officers. The strange thing is that Judge Hays, on the second appeal, expressly recognized that the 1961 and 1964 amendments to the plan had been declared void on the prior appeal (A38). That being so, there was no longer any document in existence which even purported to authorize the inclusion of non-elected persons in the plan adopted for elected officials.

Although Judge Hays said that the prior panel had not precluded him from including persons who had not been elected to office (A39) in the officers' plan, that issue had in fact previously been decided.

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* It is to be emphasized that plaintiffs never have sought and do not seek to disturb the pension coverage of administrative employees in *bona fide* pension plans reached under collective bargaining agreements. (See *Morrissey* v. *Curran*, 423 F.2d 393, 395, footnote 1a (SA 4). Incidentally, the designated "patrolmen", "field patrolmen" and "agents" involved here, like William Perry, are eligible to receive pension benefits under the NMU Deep Sea Pension Fund and unless this petition is granted will receive two pensions (*infra*, p. 12).

The plaintiffs filed a petition for rehearing which contained the suggestion, that such rehearing be heard *en banc*. That petition was denied (SA 45). None of the judges who participated in the decision on the first appeal had a right to vote on whether or not and *en banc* hearing should have been held. Both Circuit Judge Anderson and former Chief Judge Lumbard have retired and are no longer active Circuit Judges. Judge Danaher is not only retired but also is not a judge of the Second Circuit.*

Situations such as this may, unless corrected, create a serious hindrance to the effective administration of the law. In other words, litigants should not be encouraged to pursue a second round of appeals in hopes that a second panel might be inclined to disregard the decision of an earlier panel.

The existence of this intracircuit conflict is a valid and compelling reason for granting the writ requested. *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507 (1950); *Maggio* v. *Zirtz*, 333 U.S. 56 (1948).

(2 and 3)

The decision sought to be reviewed validates the appointment rather than the election of certain NMU officers; to wit, "patrolmen", "field patrolman" and "agents", and is directly at odds with Title 29 U.S.C. § 481(a) (SA11) and with *Wirtz* v. *NMU*, 284 F. Supp. 47, aff'd 399 F.2d 544 (Second Circuit, 1968, opinion by Timbers, J., Moore, C.J. concurs, Hays, C.J. dissents).

In *Wirtz* the district court held that Title 29 U.S.C. § 481(a) required that patrolmen, agents and field patrol-

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* Had an *en banc* hearing been held, Judges Anderson and Lumbard, thought retired, would have been eligible to have participated in such hearing.

men be elected to their offices and specifically said (284 F. Supp. 47, 67):

> "This court construes 29 U.S.C. § 481(a) to mean that *all* officers of a union must be *elected* and that they must be elected at least every five years." (Emphasis in original.)

Judge Hays disagreed with the majority in *Wirtz* and, in spite of the clear and explicit language of the statute, he expressed, in the following language, his strong displeasure at the congressional direction that all union officers be elected by the rank-and-file and not appointed. *Wirtz* v. *NMU,* 399 F.2d 544, at page 553:

> "I fear that, in trying to keep the courts from taking over lock, stock and barrel the internal operation of labor unions, I am fighting a fairly hopeless rearguard action. But, I am not yet compelled by any Supreme Court decision on the issue to accept the position that a union cannot provide for the appointment rather than the election of what are here called patrolmen * * *"

Obviously Judge Hays allowed his personal philosophy to affect his thinking when he undertook to overrule the prior panel of the same Court and to flaunt the express direction of an act of Congress. He was quite aware of the problem presented. He said (A39):

> "Plaintiffs contend that the judgment of the district court is inadequate because it does not include moneys paid on account of the NMU officers who were appointed rather than elected."

Incidentally, Judge Hays misconceived the plaintiffs' contention. The plaintiffs contended that the judgment was inadequate because it did not include money which had been paid for the account of all "non-elected" persons, whether characterized as officers or otherwise. The Plan

was created solely for persons elected to office. Persons appointed by Curran could not be paticipants regardless of the title Curran had conferred upon them. The Labor Management Reporting and Disclosure Act (LMRDA) became law in 1959. All the payments here involved were made after that date. Under Title 29 U.S.C. § 481(a) (SA40) only elected persons could qualify as officers.

With the concurrence of the other members of his panel, Judge Hays reached the conclusion that Curran, as President of NMU, could properly appoint persons to be "officers" (A40) in disregard of the express provisions of Title 29 U.S.C. § 481(a).

(4 and 5)

This proceeding involves questions of exceptional importance—relative to honest unionism and the application of the LMRDA to achieve that end. In the past all the Federal Courts have been especially vigilant in the protection of seamen from the several oppressions of their calling. But Judge Hays' most recent decision in the instant case, unless reviewed, will leave not only the seamen but also all rank and file members of organized labor organizations vulnerable to the danger of corrupt labor practices by rendering the fiduciary provisions of the LMRDA meaningless. This issue is of overwhelming importance to the public at large as well as to the parties involved in this litigation.

This is not the usual case where the good faith of a union official is at issue for past payments found to have been wrongful. Here, the plaintiffs gave written notice to Curran and to Wall that payments to non-elected officers, including William Perry, from the officers' Fund would be unlawful and unauthorized. The plaintiffs demanded that such payments be stopped and appropriate actions taken (SA 48-59).

Curran and Wall knew that the unlawful payment to Perry was in the works. They had the power to prevent

it. If Curran had lifted his little finger in protest, his good friend and best man, Perry, at the ripe age of 42 years, would not have walked away with $222,200 of pension funds which did not belong to him in addition to the lump sum of $176,602.61 (850a) ($104,595.16 after withholding) from NMU general funds and in addition to a Deep Sea pension of $250.00 a month for life.*

But Curran's action in signing the check to the Officers' Fund in the sum of $41,250.01 in December, 1968 illustrates his determination to see to it that Perry would receive his payment out of the officers' fund regardless of the legality of such payment.

The District Court in *Morrissey* v. *Curran*, 351 F. Supp. 775, 784 (Bonsal D.J.) found (A32-33):

> "Curran knew that the plaintiffs had requested NMU to institute this action to recover monies paid to the Officers Pension Fund for the account of non-officers on the ground that such payments violated the NMU constitution, and that it was charged that Perry was a non-officer. Curran was in a position of trust to expend NMU funds only in accordance with the NMU constitution. Curran also knew or should have known that the Agreement and Declaration of Trust did not authorize the prepayment of contributions to the Officers Pension Plan. Nevertheless, on December 18, 1968, when he fired Perry for the first time, he instructed Breit to prepare a check from NMU funds in the amount of $41,250.01 to be paid to the Officers Pension Plan for Perry's account, and on the following day he signed the check, which was then forwarded to the Officers Pension Plan. * * *

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* Judge Bonsal in his unreported decision of June 29, 1972 said (9A):

> "So despite being fired at 9:30, it wasn't a bad day for Mr. Perry."

> "• • • The evidence indicates that *Curran dominated the people who had anything to do with the payment from the Officers Pension Plan to Perry.* Karchmer testified, 'Well, to go in to Joe [Curran] is a very fearful process.' • • • Undoubtedly, Curran used the power of his office to get Perry everything that was coming to him on January 16th. However, there is no evidence that on January 16th Curran directed the payment to Perry of $222,200 or directed Freedman to furnish the legal opinion *to the trustees.*" (Emphasis added. Bracketed matter in original.)

Indeed Curran, himself, never claimed that he consulted counsel or relied on any legal advice. No excuse was offered for his failure to prevent the unlawful payment to Perry.

Unless these findings of fact by the district court were overlooked, it is difficult to understand how Judge Hayes ever reached the conclusion that "the record shows that Curran and Wall acted in good faith, relying on the advice of the union's general counsel" (A43) or that the finding that Curran "dominated the trustees" was merely an "argument" (A44):

> "Plaintiffs now *argue* that Curran dominated the trustees and it was through this power that the payment to Perry was made." (Emphasis added.)

Curran and Wall breached their fiduciary duty to the membership in failing to prevent the payment to Perry of $222,200. This comes into sharper focus in the light of Judge Bonsal's findings that Curran "dominated" the trustees and that Curran was a fiduciary of the NMU funds including the funds in the NMU Officers' Pension Plan (A32):

> "For the purposes of Section 501(a), the funds paid by NMU to the Officers Pension Plan and by it to Perry were funds of NMU."

Curran and Wall were experienced and sophisticated labor union leaders. They were with Perry and behind him all the way—from beginning to end—regardless of the consequences. They required no legal opinion to induce them. They wanted Perry to have that $222,200. They not only failed to prevent the unlawful payment but also did all in their power to sustain it.

In fact, after the May 23, 1969 decision of the district court, which granted plaintiffs' motion for summary judgment and adjudicated the Perry payment unlawful, Curran and Wall went so far as to frantically call the National Council together to amend the NMU Constitution retroactively. Had they succeeded in that bold move, Perry would have been home free—richer by $222,200.* But that amendment was declared void on the prior appeal.

They supported Perry in every conceivable way after he had been paid off. They furnished him with legal counsel and joined with him in all the briefs and papers filed on his behalf from the time this action was instituted in the district court right on through the time this Court denied the defendants' first petition for a writ of certiorari.

Surely all that should have been persuasive and overwhelming evidence of the interest Curran and Wall considered foremost. It was not NMU's interest. In fact, these actions constitute additional breaches under the Act. Section 501 cautions union officers that they should:

> "* * * refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or *personal* interest which conflicts with the interests of such organization * * *" (Emphasis added.)

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* This payment had not been reported to either the membership, or to the Secretary of Labor [29 USC § 431(b)(3)]. Had plaintiffs not succeeded on the first appeal, the membership never would have even known how much Perry really got.

(6)

The District Court found as a fact that "the trustees had made unlawful pension payments to employees in the amount of $371,271." That finding was acknowledged by Judge Hays (A39). Among those payments was a payment of over $115,000 to Irving Brauch. The district court held that (except for the payment to Perry) these unlawful payments had been made by the trustees prior to the plaintiffs' notice and for that reason the trustees were not to be surcharged for those payments.

But it seems plain that a trustee having made an unlawful payment has a duty to make every reasonable effort to replenish his trust after receipt of notice that the initial payment had been unlawfully made.

The notice that unlawful payments had been made to Brauch and to others came in a most dramatic form—the decision of the district court on May 23, 1969. After receipt of such notice, the trustees sat back for a period of three more years. They deliberately and willfully failed to take any action to collect the $115,000 which had been unlawfully paid to Brauch. They thereby allowed the statute of limitations to run against them on April 6, 1972 (CPLR 213[2]). It is for this deliberate failure to act that the trustees should have been surcharged if not for the initial unlawful payment made by them to Brauch.

Neither of the courts below spoke on this issue. It does not appear that either of them addressed itself to the issue presented by the plaintiffs—the liability of the trustees based upon their deliberate failure to attempt to collect the initial unlawful payment to Brauch—thereby permitting the statute of limitations to run against them.

The trustees may not be exculpated from the consequences of such a wilful omission. Allowing their claim against Brauch to become uncollectible through their inaction was intentional. Indeed, trustee Freedman, an

attorney himself, and familiar with the statute of limitations and the law on the subject, testified that he had no interest in pursuing Brauch (527-528a):

"Q. Did you engage any other attorney to start a suit on behalf of the trustees to collect that money? A. I didn't.

Q. Are you interested in collecting that money?

• • •

The Court: I think if Mr. Freedman has any views on it, I will let him answer that.

The Witness: I really haven't your Honor."

90 *Corpus Juris Secundum,* Trusts § 263, provides at pp. 324-325:

"§ 263. General Powers and Duties

A trustee has the exclusive right and duty to proceed, within a reasonable time, by suit or other legal proceeding, if necessary, to collect or reduce to possession all claims due, and all property and assets belonging to, the trust estate; and a failure to perform these duties with due diligence renders him personally liable for the resulting loss.

It is the right and duty of the trustee, and of him alone, to proceed promptly, or within a reasonable time, by suit, or other legal proceeding, if necessary, to collect or to reduce to possession the property and assets belonging to the trust estate, and to collect all claims due the estate. A failure to perform these duties, with due diligence, renders the trustee personally liable for the resulting loss."

See also: *Scott on Trusts,* The Administration of the Trust, § 177, pp. 1424-1427; *Village of Brookfield* v. *Pentis,* 101 F.2d 516, 521, 522 (Circuit Court of Appeals, 7th Circuit, 1939); and *Grodsky* v. *Sipe,* 30 F. Supp. 656 (District Court, Eastern District of Ill., 1940).

(7)

The decision below creates or at least permits a subtle erosion of the power of the federal courts—*vis-a-vis* the power of a labor union leader—Joseph Curran.

On or about February 2, 1972 a payment of $674,222.60 was made by the NMU Officers' Pension Fund to the NMU to satisfy the judgment plaintiffs had obtained in this action.

In the same month NMU, through Curran and Wall, paid Alvin Shapiro as trustee $460,365. This money was paid to Alvin Shapiro for the very same improper and unauthorized purposes which had been the basis for the $674,222.60 judgment in the first instance. The new payment was made to secure pensions for the persons eliminated from the elected officers' plan by Court order. In other words, the circle had been completed—the money paid out, then restored by order of the Court, and finally paid out again for the original unlawful purpose.

There were no bones made about it.

Curran testified at the trial that this Shapiro trust was for the benefit of the persons who had been deprived of their share of the Officers Pension Fund by the order of this Court (616a):

> "Q. Mr. Curran, did you report * * * at the National Convention that you would see to it that these payments (pension payments which the Court had held were wrongfully made to non-officers) would be made whatever the court might rule?
>
> * * *
>
> The Witness: I said that, Your Honor." (Parenthetical matter added.)

Curran went on to say:

> "The Witness: We set up another pension plan in accordance with the instructions we had from the

> National Council that took into consideration those people who were barred from being a part of the Officers' Pension Plan." (610a)

Curran testified that the new Plan was in effect (610-611a). Wall testified the money had been paid out to Alvin Shapiro as trustee (776-777a).

The new trust gave Curran a free hand with the fund. It provided in part (SA77):

> "* * * The amount and nature of the benefit program to be provided by the Plan and conditions of payment shall be determined by the National Office (the handful of national officers (5) of NMU controlled by Curran) of the Union and furnished in writing to the Trustee * * *" (Parenthetical matter added).

This was precisely in line with Curran's earlier efforts to circumvent the order of the district court (by amending the NMU Constitution retroactively) which efforts were declared void by the Court of Appeals on the prior appeal.

Mr. Curran's acts spoke louder than his words, but his words clearly expressed his intention to circumvent the court order right from the outset. He said (806-808a):

> "Now to get back to the purpose of this Special Meeting, I think you have been talked to, most of you, about what happened here in the Federal Court in the District, Judge Bonsal handed down a Decision that there is no authorization to include in the Officer's Pension Plan non-elected officers. * * * Now, the case, of course, is being appealed. It had to be appealed because it's a bad piece of law. * * *
>
> The question is, the resolution that is the clearest one is the one that we will work with to amend the Constitution to protect these people. * * *
>
> "* * * that's as far as we can go and then the constitution will be amended and that will take care of the

situation. Otherwise, if it is not amended, it would then become the job of the national officers, particularly the President, to call in these people and make a contract with each of them as individuals to protect their rights and, of course, under contract of that type it wouldn't be for pension, you see, but it would be a service credit contract; one in which they would protect their service credit for each year worked. You would give them a percentage as a deferred income, so to speak, which is the new slogan used by executives. I saw the Wall Street Journal and one of the other papers and saw that Henry Ford got $200,000 in wages one year and $400,000 in deferred income. So that this is a new way to handle these things.

• • •

"So I have assured them all that even if the constitution were (not) amended, that I felt that we would undertake to make an individual contract with each one of them in behalf of the union seeing that their rights were protected."

The District Court after hearing this evidence and after the defendants had rested directed that the original of the new trust agreement be produced (786a). In response, Mr. Epstein, Curran's counsel, wrote a letter dated July 20, 1973 (55-56a) which stated that the trust agreement had not yet "been executed by the parties," but that nonetheless on February 29, 1972, $460,365.00 had been deposited in an interest bearing account. As of June 8, 1972 the account had "increased to $476,499.35 by reason of interest earned • • • and deposits therein for the months of March, April and May."

The District Court did not speak on this subject. Despite that silence Judge Hays undertook to approve this segregation of funds from the General Fund of the union and (apparently relying on the self-serving, hearsay state-

ments contained in the unsworn Epstein letter, *supra* upon which plaintiffs had no opportunity to cross-examine) made his own findings of fact. He said (A44):

> "• • • First, the union never paid the money to Shapiro; the trust agreement was never executed. Even if the money had been paid, the proposed pension plan for current employees was for future payments. Consequently, the establishment of the fund was permissible and not prohibited by this court's prior decision."

In making these original finding Judge Hays could not have considered the following facts adduced at trial:

1. Wall, the Secretary-Treasurer of NMU—the man who knew—testified that the money had been paid out. That testimony had not been contradicted.

2. Such payment of $460,365.00, as Judge Hays himself observed, was made on the strength of an unexecuted document. How could anyone justify the payment of almost one half million dollars of union funds without the protection of a writing?

3. The NMU Constitution, Article 17, Section 1 provides:

> "All monies of the Union shall be maintained in a General Fund."

4. The "NMU Statement of income and expenses of the General Fund for all Ports and National Headquarters for the month of February, 1972" carried $626,260 as the operating expenses of the National Headquarters for that month (SA75). Mr. Wall testified that a substantial part of that sum went into the new trust (776-777a).

5. Curran, the President of NMU, testified that the plan was in effect. That testimony had not been contradicted.

6. The new trust, itself, does not indicate who is to participate in it, nor does it limit the extent of the participation (*supra*, p. 18). On its face, it is no *bona fide* pension plan. It is merely a vehicle designed to give Curran *carte blanche* to siphon NMU funds in large sums to the select persons (including his son) excluded by the court order —without reporting the payments either to the membership or to the Secretary of Labor in accordance with LMRDA, Sec. 201 [29 U.S.C. § 431 (b)(3)]. A seaman would call it: "A raid on the treasury."

7. The NMU Constitution, in effect, at the time of the payment, did not authorize the creation of such a trust.

In short the facts as found by Judge Hays with respect to this payment of almost a half million dollars of NMU funds are shockingly wrong and totally devoid of evidentiary support. In fact, they are contrary to all the evidence adduced at the trial. See *Washington* v. *U. S.*, 357 U.S. 348 (1957).

Again this procedure "so far departed from the accepted and usual course of judicial proceedings * * * as to call for an execise of this Court's power of supervision" (Rule 19, *supra*, p. 6).

Conclusion

For the foregoing reasons this cross petition for a writ of certiorari limited to the issues presented should be granted and it is respectfully suggested that under the circumstances this Court may well deem a summary reversal on these issues appropriate.

Respectfully submitted,

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